Aqua Cool, a Division of Ionics, Inc. *and* Teamsters Local Union No. 404, a/w International Brotherhood of Teamsters, AFL–CIO

Ionics, Inc. *and* Teamsters Local Union No. 404, a/w International Brotherhood of Teamsters, AFL–CIO, Petitioner. Cases l–CA–34338 and 1–RC–20467

September 18, 2000

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On January 3, 1997, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

We adopt the judge's findings and conclusions that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by the following: soliciting grievances from employees and promising to remedy them; threatening employees that they were likely to lose their benefits and that the Respondent would bargain from scratch if employees elected union representation; implying to employees that voting for the Union would be futile; threatening an employee that the facility would close and implying that jobs would be lost; granting employees a benefit by hiring a warehouse worker to perform tasks formerly assigned to drivers; and granting new benefits to its drivers and improving their terms and conditions of employment by awarding them new routes on the basis of seniority and by ceasing to harass them for taking sick leave.

The judge found that the Respondent further violated Section 8(a)(1) by promising employee Billy Massey benefits if he rejected the Union. As explained below, we adopt the judge's finding as modified; and we find that the Respondent similarly promised benefits to employee Chris Martin.

We reverse the judge's finding that the Respondent violated Section 8(a)(1) of the Act by: creating an impression of surveillance during a meeting between Vice President Kachig Kachadurian and employee Steven Maymon and telling Maymon that the driver who contacted the Union was a "troublemaker."

1. In finding that the Respondent threatened employees with loss of benefits, that it would bargain from scratch, and that electing union representation would be futile, we find that Kachadurian's words, both alone and in context, establish the violation.

Our dissenting colleague contends that Kachadurian's statements to employees Chris Martin, Billy Massey, Alan Tetrault, and Scott Stephenson were lawful communications by the Respondent that any reduction in wages or benefits would occur as a result of the normal give-and-take of collective-bargaining negotiations, rather than unlawful threats. In so finding, our colleagues ignore the express language of Kachadurian's threats and the context in which they were uttered. Thus, Kachadurian told Martin that if employees elected union representation they "would lose all our benefits and we would have to start [negotiations] from zero." Kachadurian told Tetrault that employees "would be starting all over" and that they were unlikely to win anything more (and possibly less) at the bargaining table than the bulk of the Respondent's employees. He told Massey that employee benefits "would be going back to scratch." He told Stephenson that employees "would have to bargain for *another* health benefit package." (Emphasis added.) Kachadurian's own words belie our colleague's contention that his "statements were unaccompanied by threats that employees would lose pay and benefits or that the amount of pay and benefits employees might ultimately receive would depend upon what the Union could induce the Respondent to restore."

Moreover, the circumstances surrounding Machadurian's threats could hardly have been more coercive. In an unprecedented move, Company Vice President Kachadurian and other high-level executives traveled from their distant office to the Ludlow facility to meet privately with individual drivers in the Respondent's executive offices to impress upon the drivers the dangers of bringing the Union into the facility. Further, under the circumstances, we agree with the judge that Machadurian's later, ambiguous remarks to Martin and Tetrault that bargaining might result in the same, greater, or lesser benefits did not negate the effect of Kachadur-ian's other words.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Unlike our dissenting colleague we find this case indistinguishable from *Noah's New York Bagels,* 324 NLRB 266 (1997), in which the Board held that an employer's unlawful statement that benefits "would be" reduced was not cured by a followup remark that wages were the result of negotiations. The Board found that the statement could reasonably be understood to mean that wages would revert to a minimum at least until negotiations were concluded and then could be raised, lowered, or remain the same.

For essentially the same reasons, we agree with the judge that Kachadurian's statement to Tetrault—that employees were unlikely to win anything more (and possibly less) at the bargaining table than the bulk of the Respondent's employees—independently violated Section 8(a)(1) by implying that it would be futile for employees to elect union representation. The implication of his remark was clear—employees would gain nothing more from the Respondent at the bargaining table than they would receive without a bargaining agent. *Webco Industries v. NLRB*, 217 F.3d 1306 (10th Cir. 2000), enfg. 327 NLRB 172 (1998) (bargaining from scratch statements were an unlawful threat of loss of benefits that the union would have to bargain to get back).

2. The Respondent has excepted to the judge's finding that the Respondent unlawfully promised benefits to Massey. In making this finding, the judge relied on Massey's testimony that during a one-on-one meeting with Vice President Kachadurian, Kachadurian told him that as long as "we stayed together and worked through the problems and we stayed—mainly me stayed loyal to the company, that he would take care of me."

According to the judge, as Kachadurian made the foregoing statement to Massey, Kachadurian "point[ed], by way of example, to Supervisor Mapel." As to this point, the judge inadvertently has juxtaposed Massey's testimony with that of employee Martin. Martin testified that, during a one-on-one meeting, Kachadurian told Martin that Martin should look at his "boss at the time, Chris Maples [sic] . . . [who] started as a driver and now look that he's a boss or a supervisor . . . [a]nd that there are always—that there were opportunities to advance in the company . . . that there were opportunities to advance in the company . . . if employees stayed loyal to the company, you know, the company would stay loyal to the employees."

Accordingly, we find merit in the Respondent's exception only insofar as it establishes the need to clarify the judge's findings with regard to promises of benefit made by Kachadurian to employees Massey and Martin. As shown, the Respondent promised to "take care of" Massey if he stayed loyal to the Respondent. The Respondent made a similar promise to Martin, and illustrated it with a reference to the prospect of Martin's becoming a supervisor. Accordingly, we find that the Respondent unlawfully promised benefits to both Martin and Massey if they would abandon their support for the Union. In making this finding, we note that the "problems" Kachadurian urged Massey to work through together with the Respondent would be understood to refer to the union organizing campaign. We also note that there is no evidence that the Respondent had met with employees and discussed "loyalty" prior to the start of the union organizing campaign. Thus, the employees reasonably could have concluded that Kachadurian's exhortation regarding "loyalty" was a suggestion that the Respondent considered union support to be inconsistent with loyalty to the Company, and that "loyalty" would be rewarded. Moreover, Kachadurian's statements must be viewed in the context of the Respondent's other unfair labor practices. Thus, we find that the Respondent violated Section 8(a)(1).[2]

3. We reverse the judge's finding that the Respondent violated Section 8(a)(1) by creating the impression of surveillance of employees' union activities and separately violated Section 8(a)(1) when Kachadurian told employee Maymon that the Company "knew" that employee Martin was responsible for initiating the union campaign and labeled Martin a "troublemaker."[3]

Maymon's testimony was that:

> [Kachadurian] said that he knew Chris Martin came from Teamsters and he *assumed* that he was the one that started all of this trouble making, if that's the word you want to call it. He's the one that started to get the Teamsters involved in this. [Emphasis added.]

We note that it is not clear from Maymon's testimony whether Kachadurian described Martin's purported activities as "trouble making," or whether "trouble making" was a term that Maymon selected to convey his under-

[2] Unlike his colleagues, Member Hurtgen would find that Kachadurian's statements to Martin and Massey were, at most, ambiguous. He would not infer an unlawful promise of benefit from such ambiguous statements. There is no evidence that an employee could "stay loyal" to the Company only by rejecting the Union. Indeed, the record reflects no other references by the Respondent to "loyalty" in the context of the union organizing campaign. And, absent such evidence, there is nothing improper about telling employees that "loyal" employees can be promoted. In this latter regard, Member Hurtgen notes that the Respondent has a practice of promoting employees when opportunities arise. Thus, he finds that neither statement provides sufficient grounds to support an unfair labor practice finding or the direction of a new election.

[3] In fact, as the judge noted, Maymon had been responsible for initiating the union campaign.

standing of Kachadurian's opinion.[4] In light of this ambiguity in Maymon's testimony and the lack of clarifying or corroborating testimony by any other witness, we decline to find that Kachadurian violated the Act by labeling Martin as a troublemaker.

We also find merit in the Respondent's exception to the judge's "impression-of-surveillance" finding. According to Maymon, Kachadurian said that he "assumed" that Martin was the instigator of the union campaign. From this statement, Maymon would not reasonably infer that Kachadurian knew whether Martin was the initiator of the union campaign. Accordingly, Maymon could not reasonably infer that Kachadurian was surveilling Martin's activities.

Accordingly, we reverse the judge's unfair labor practice findings and deny the parallel election objections.

Amended Remedy

We have dismissed certain of the unfair labor practice allegations and those election objections that are coextensive with them. However, in light of the Respondent's other unlawful and objectionable conduct, we adopt the judge's recommendation that the results of the July 11, 1996 election be set aside.

We conclude, however, that the 8(a)(1) violations in this case can be adequately remedied by our customary notice posting and cease-and-desist order and, thus, that a *Gissel* bargaining order (*NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969)) is not warranted. A *Gissel* bargaining order is an extraordinary remedy. The preferred route is to provide traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by those remedies. The *Gissel* (nonelection) route is to be used only in circumstances where it is unlikely that the atmosphere can be cleansed by traditional remedies.

The Respondent has committed a number of 8(a)(1) violations. However, the only "hallmark" violation is one isolated threat of plant closure directed at employee Maymon by Kachadurian.[5] Although "hallmark" violations are coercive, they do not always mandate the imposition of a bargaining order.[6] In determining whether a bargaining order is appropriate the Board examines the severity and extent of the violations, and seeks to gauge whether the coercive effects of the unfair labor practices would likely prevent the holding of a fair election, even after the curative effects of a traditional remedy.[7]

Although we neither condone nor minimize the Respondent's unfair labor practices, we find that "[they] are not so pervasive, severe, or lingering in effect to render unlikely the holding of a fair second election." *Uarco, Inc.,* 286 NLRB 55 (1987).

For all the above reasons, we are persuaded that traditional remedies are adequate to cleanse the atmosphere of the effects of the Respondent's misconduct and permit the holding of a fair election.[8] We shall follow that route.

ORDER

The Respondent, Aqua Cool, a Division of Ionics, Inc., Ludlow, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances from employees, promising to remedy those grievances, or remedying them in order to discourage employees from supporting the Union.

(b) Threatening to bargain from scratch if employees elect union representation and implying that voting for the Union would be futile.

(c) Promising benefits to employees if they do not select the Union as their bargaining representative.

(d) Threatening employees with plant closure or job loss if they select the Union as their bargaining representative.

(e) Interfering with, restraining, and coercing employees in the exercise of their Section 7 rights by granting benefits and improving employees' terms and conditions of employment, hiring a warehouse worker to perform work inappropriately assigned to other employees, grant-

[4] The judge did not make findings regarding this issue.

[5] Maymon testified that Kachadurian made the following statement regarding "closing up the place" (the Ludlow facility): "he basically said he doesn't know if the place will stay open. He doesn't know if the place will close. He didn't give a direct line."

[6] See, e.g., *Burlington Times,* 328 NLRB 750 (1999).

[7] Id. at 718, and cases cited there.

[8] Member Hurtgen also relies on the fact that 4 years have passed since the unfair labor practices were committed and that Kachadurian, the executive in charge of Aqua Cool and the person responsible for most of the unfair labor practices, is no longer employed by the Respondent. Although such evidence is not dispositive, it is clearly a relevant factor in determining whether a fair election can now be held.

Given the pervasive nature of the violations and the high level of the management officials who committed them, Member Liebman believes that additional remedies are appropriate in this case to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices and to ensure that a second election can occur in an environment free of these effects. See, e.g., *Audubon Regional Medical Center*, 331 NLRB No. 42 (2000); *Wallace International of Puerto Rico,* 328 NLRB 29 (1999). Accordingly, she would order the Respondent (1) to provide the Union with the names and addresses of its current employees, (2) to convene all unit employees during working time and permit a Board agent, in the presence of a responsible management official of the Respondent, to read the notice to employees, and (3) to grant the Union and its representatives reasonable access to the Respondent's bulletin boards.

ing delivery routes on the basis of seniority, and improving the way employees are treated after taking sick leave.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Ludlow, Massachusetts, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 24, 1996.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[Direction Second Election omitted from publication.]

MEMBER HURTGEN, dissenting in part.

I would reverse the judge's finding that the Respondent unlawfully threatened to bargain from scratch and implied that voting for the Union would be futile. In making that finding, the judge relied on credited testimony by employees Martin, Massey, Tetrault, and Stephenson regarding statements made by Kachadurian. She noted that the exact words attributed to Kachadurian by the employees varied somewhat, but found that their meaning and effect was the same. That is, the employees could reasonably have understood that if they elected union representation, "they would lose their present benefits, and . . . that bargaining would be from scratch or from zero."

In its exceptions, the Respondent contends that Kachadurian's statements are protected by Section 8(c) of the Act and that they are not objectionable. I find merit in these exceptions. Accordingly, I conclude, contrary to the judge, that the Respondent has not violated the Act or engaged in conduct that compromised the election in these respects.

Under the precedent cited by the judge:[1]

> "[B]argaining from scratch" statements by employer[s] . . . violate Section 8(a)(1) . . . if, in context, they reasonably could be understood by the employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. . . . [S]tatements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

Contrary to the judge, I conclude from my review of the record that Kachadurian's statements regarding bargaining from scratch "make it clear that any reduction in wages or benefits will occur only as a result of the normal give-and-take of negotiations."

Employee Martin testified that Kachadurian told him:

> I was lucky now that I had such good benefits, but if we became represented by the Union, that we would lose all our benefits and we would have to start from zero, and we may end up with the same, we may end up with less. And we may end up with more. But he doubted we would end up with more, because he—it wouldn't be right that we had better benefits than other people in the company.

As noted, Kachadurian referred to the possibility of more benefits as well as the possibility of less (or the same). Thus, the clear reference was to the bargaining process. Indeed, such possibilities are inherent in bargaining. Kachadurian truthfully told Martin that the collective-bargaining process might produce more or fewer benefits for employees. An employer's "message to employees that union representation was no guarantee of better benefits and might result in less desirable benefits is legitimate campaign propaganda which employees are capable of evaluating. Such expressions of views are protected by Section 8(c) of the Act."[2]

Further, I find that any ambiguity or potentially coercive effect which might have been created momentarily by Kachadurian's statement that benefits "would" be lost was immediately cured when Kachadurian explained that employees could emerge from bargaining with less, more, or the same wages and benefits. Kachadurian fur-

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *Taylor-Dunn Mfg. Co.,* 252 NLRB 799, 800 (1980).

[2] *Mediplex of Connecticut, Inc.,* 319 NLRB 281 (1995).

ther explained that the Respondent would be concerned, during negotiations, with the level of benefits sought on behalf of the unit employees as compared with those received by all of its other employees. Thus, in context, Kachadurian did not tell employees they would lose benefits and would have to bargain to get them back.[3]

In sum, Kachadurian was *not* telling employees that benefits would actually be cut prior to negotiations. At most, he was telling employees that the Respondent might commence bargaining with a proposal that was less than the current benefits. Of course, there is nothing unlawful in such a bargaining stratagem. Indeed, it is often part and parcel of the bargaining process. Nor is there anything to suggest that the Respondent would reduce benefits in retaliation for the employees' selection of the Union. Rather, Kachadurian simply informed Martin that the outcome of negotiations was unpredictable, and that the normal give-and-take of bargaining could result in a reduction or an increase in employees' wages and benefits.

Kachadurian's statements to Tetrault, Massey, and Stephenson were similar to his statement to Martin.

According to Tetrault, Kachadurian reviewed the Respondent's benefit plan with him and said that bargaining

> would be in the hands of the lawyers . . . [w]e would be starting all over . . . [and] our office probably would not get more than 1800 other people in the company . . . [m]eaning if we went Union, that he would doubt that we'd benefit more.

Massey testified that Kachadurian told him that

> if we voted in the Union, that all our benefits more or less the 401K, since I belonged to that and the pension plan which I belonged to, would be going back to scratch and we would have to—it would be mostly up to the lawyers.

According to Stephenson, Kachadurian told him:

> [A]s far as the benefits are concerned . . . you know you have a good thing and if the Union does come in, then he just wanted to let me know that we would have to bargain for another health benefit package.

I find, in each instance, that Kachadurian's statements are accurate accounts of the collective-bargaining process and its possible outcome. Thus, Kachadurian accurately told Tetrault and Massey that bargaining over benefits would be "in the hands of the lawyers," and that the Respondent would consider, as a factor during collective bargaining, the benefits sought for unit employees, in comparison with the benefits earned by the rest of its large, multilocation work force. Kachadurian truthfully informed Massey and Stephenson that employee benefits would be subject to negotiations. His statements were unaccompanied by threats that employees would lose pay and benefits or that the amount of pay and benefits employees might ultimately receive would depend upon what the Union could induce the Respondent to restore. Thus, I cannot conclude that the statements had a reasonable tendency to coerce employees. Accordingly, I find that Kachadurian's statements did not violate the Act.

I also would reverse the judge's finding that Kachadurian independently violated Section 8(a)(1) by implying to Tetrault that it would be futile for employees to elect union representation. The judge found that Kachadurian "in effect . . . told the drivers that it was pointless to vote for the union, since nothing would be gained beyond what they would receive without a collective bargaining agent." I have found that Kachadurian's statement to Tetrault accurately conveyed to employees that the Respondent would have to consider the pay and benefits earned by the bulk of its large, multilocation work force as a factor in negotiating benefits for the unit employees. Kachadurian never said or implied that bargaining could not result in an improvement of wages and benefits. To the contrary, he said that wages and benefits were subject to bargaining, and that they might get better and might get worse. Concededly, his *opinion* was that such bargaining would not result in better wages and benefits for unit employees as compared to other employees. But, that does not establish futility. Accordingly, in my view, a threat of futility cannot reasonably be inferred from Kachadurian's statement to Tetrault.

APPENDIX

NOTICE TO EMPLOYEES

[3] Compare, *Noah's New York Bagels*, 324 NLRB 266, 266–267, 279 (1997) (finding unlawful employer statement that benefits would revert to a minimum and there would be as long as 2 years of negotiations before employees would know whether they would retain their preelection wage and benefit levels). My colleagues contend that *Noah's Bagels* supports finding a violation here. I disagree. In that case, the employer told employees that as a result of electing union representation, wages and benefits would be reduced and that wages could go up, down, or remain the same after negotiations. However, it concurrently threatened employees that "there would be a long period of negotiations, as long as 2 years, before employees would know whether they would go back to what they had been making before the Union got in." Thus, the assertedly curative remark was belied by a contemporaneous statement expressly stating that benefits would be lost and may not be regained. There is no such similar statement here.

Webco Industries, 327 NLRB 172 (1998), enfd. 217 F.3d 1306 (10th Cir. 2000), also cited by my colleagues, is distinguishable. In the instant case, the Respondent told employees that, in bargaining, they could get more or less or the same. There was no similar statement in *Webco*.

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit grievances from our employees, promise to remedy those grievances, or remedy them, in order to discourage employees from supporting the Union, by such actions as improving their terms and conditions of employment, hiring a warehouse employee to perform duties formerly assigned to other workers, granting delivery routes on the basis of seniority, and harassing employees for taking sick leave.

WE WILL NOT threaten that you are likely to lose your benefits or that we will bargain from scratch if you elect union representation, or imply that voting for the Union would be futile.

WE WILL NOT promise that employees will receive benefits if they do not select the Union as their bargaining representative.

WE WILL NOT threaten employees with plant closure or job loss if they select the Union as their bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act.

AQUA COOL, A DIVISION OF IONICS, INC.

Joseph F. Griffin, Esq. and *Darci Ricker, Esq.,* for the General Counsel.

Patrick L. Egan, Esq. (Jackson, Lewis, Schnitzler & Krupman), of Boston, Massachusetts, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Pursuant to a charge filed by Teamsters Local Union No. 404, a/w International Brotherhood of Teamsters, AFL–CIO[1] on July 16, 1996, as amended on August 27 and September 3, 1996,[2] a complaint issued in Case 1–CA–34338, alleging that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act.[3] Thereafter, on July 11, the Regional Director for Region 1 issued a Report on Objections to an Election in Case 1–RC–20467, in which she decided that since the Union's objections were identical or similar to the allegations in the complaint, the matters would be consolidated for hearing. Accordingly, an order consolidating cases, complaint and notice of hearing issued on September 20. The Respondent filed a timely answer on October 4.

This case was tried in Springfield, Massachusetts, on October 30 and 31, at which time the parties had the opportunity to examine and cross-examine witnesses, introduce documentary evidence, and argue orally. On the entire record in this case,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I reach the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Aqua Cool, a Division of Ionics, Inc. (Respondent, Aqua Cool, or the Company), a corporation, with an office and place of business in Ludlow, Massachusetts (the Ludlow facility), has been engaged in the manufacture, sale, and distribution of bottled water. In conducting its business, Respondent purchases and receives at its Ludlow facility products, goods, and materials valued in excess of $50,000 annually directly from points outside the Commonwealth of Massachusetts.

In the year preceding the issuance of the above-captioned complaint, Respondent, in the course and conduct of its business operations described above, performed services valued in excess of $50,000. Respondent also sells and ships from its Ludlow facility annually, goods valued in excess of $50,000 directly to points outside the Commonwealth. Accordingly, I find that at all material times, Respondent has been an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Respondent's Ludlow Aqua Cool facility is one of 18 distribution centers, which, together with 4 bottling plants, form a division of Ionics, Inc., an International corporation employing 1500 persons worldwide. At the time of the trial in this matter, the work force at the Ludlow facility included seven full-time drivers who were engaged in selling and delivering bottled water to customers in the area, and a warehouseman who

[1] Hereinafter Local 404 or the Union

[2] All events took place in 1996, unless otherwise specified.

[3] Hereinafter the Act.

[4] Documents offered into evidence by counsel for the General Counsel (General Counsel) are referred to as GCX, followed by the appropriate exhibit number; documents offered by the Respondent are cited as RX, and references to the transcript are designated as TR, followed by the relevant page number.

cleaned coolers, and loaded or unloaded the trucks.[5] Four salespersons also worked at the Ludlow site, but were not included in the unit. Respondent shares its building with another company, Elite Chemicals, which is included in a separate division of Ionics.

In late December 1995, Steven Maymon, a driver stationed at the Ludlow site, contacted Peter Krawczyk, business agent for Teamsters Local 404, to arrange a meeting with his fellow workers who were interested in obtaining information about organizing. As planned, Krawczyk met with some five or six Aqua Cool drivers on January 9, 1996. Subsequently, Maymon distributed union authorization cards to the drivers and returned six cards to Krawczyk, which he and fellow drivers Chris Martin, Scott Atkins, Al Tetrault, David Massey, and Steve Stephenson had signed.

At a May 22 meeting with Krawczyk, the drivers signed a petition registering their desire to have the Local serve as their collective-bargaining representative. Two days later, Krawczyk met with Respondent's plant manager, Steve Begley, and requested recognition of a unit described as including all full-time and part-time driver-servicemen, warehouse workers and water supply drivers. Begley indicated he could not respond to the request without consulting his superiors. When Begley did not contact him within a specified period of time, Krawczyk mailed the petition to the Board.

After the parties entered into a stipulation for a consent election, the Union received an employee eligibility list which Krawczyk noted contained some unfamiliar names. An election was held on July 11, which the Union lost by a vote of 8 to 1.

B. The Drivers Describe Meetings with Management

Upon learning that Local 404 had filed the election petition, three of Respondent's senior executives responsible for the management of the Aqua Cool Division, Ionics Vice President Kachig Kachadurian, General Manager Thomas Dee, and U.S. Distribution Manager Paul Goldman,[6] traveled from their offices in Watertown, Massachusetts, to Ludlow. There they met with the drivers on an individual basis in order to find out why they wanted union representation. Although the three generally visited the Ludlow plant once a month for business reasons, this was the first time they met and spoke with any of the drivers, other than exchanging casual greetings.

By and large, the drivers provided consistent accounts of their interviews. Christian Martin (Martin), for example, stated that Kachadurian, Respondent's spokesman at the meeting, told him how fortunate he was to receive the Company's benefits, which he said were the same as those an MIT graduate would receive. Then, Kachadurian advised him that if the Union prevailed, bargaining would start from zero, so that the employees could wind up with the same, less, or greater benefits. However, he expressed doubt that they could win greater benefits at the bargaining table than they currently enjoyed, for they would be unfairly advantaged in the eyes of the vast majority of Ionics unorganized employees. He also told Martin that if the Union was authorized to represent the employees, he would no longer be able to talk freely with the men. He suggested that a union would not work well at Aqua Cool since no other division was organized. Moreover, he didn't feel the drivers needed a union because everyone in the Company had always worked together. Noting that Martin had not been employed for long, Kachadurian urged him "to give the Company a chance," pointing out employees who remained loyal to the Company had opportunities for advancement.[7] When Kachadurian mentioned that he also would be speaking with the other Ludlow drivers, Martin asked if all of the drivers could be present at any future meetings, explaining at the trial, that he felt uncomfortable meeting alone with a ranking company official. Kachadurian assured him he would get back to him, but Martin did not hear from him again.

Scott Atkins had been driving for Aqua Cool for 2 years, when Operations Manager Goldman met with him for the first time. Like Kachadurian, Goldman began by reviewing the employee benefits package. When he asked about problems on the job, Atkins complained that the drivers were required to load and unload trailers and clean coolers after making deliveries for 8 hours without receiving additional pay for the extra hour or 2 of work. Atkins also mentioned that taking sick leave was frowned upon and resulted in the returning employee being penalized with extra work. Goldman said he had been unaware of these conditions and would try to correct them. Kachadurian, who with Dee, joined them as the meeting was about to end, told Atkins that he hoped they would be able to continue talking with one another, but he would have to defer to the lawyers and would be unable to help the drivers if they voted for the Union. However, he assured Atkins that they did not want to change his vote, and that he was free to vote as he chose

Driver Alan Tetrault met with the three officials on the same date. He also recalled that Kachadurian said that if the Union prevailed, he would be unable to speak with the employees directly; but would have to go through lawyers. Tetrault also remembered that Kachadurian warned that bargaining would begin from zero and that it would be unlikely that a small group of employees at one facility could gain benefits greater than those granted to the vast majority of employees who were unorganized.

During this same period of time, two other Ludlow drivers, Billy Massey and Scott Stephenson, described separate but similar meetings with Dee, followed by a meeting a few days later with Kachadurian. Massey said that Dee simply gave him information about the Union and urged him to weigh both sides. Stephenson said that Dee told him to vote with his heart and do what was right.

[5] The parties stipulated to the appropriateness of the following bargaining unit:

> All full-time and regular part-time warehouse workers, driver/servicemen and water supply drivers, employed by the Employer at its 203 West Street, Ludlow, Massachusetts facility in its Aqua Cool bottled water distribution business, but excluding all other employees, office clerical employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

[6] Hereinafter, each witness will be referred to by his last name.

[7] Martin began his employment with Respondent in March 1996.

Kachadurian was less restrained than his colleagues in his talks with the employees. Massey testified that Kachadurian told him if the Company had to deal with the Union, bargaining over benefits would begin from scratch. When Kachadurian asked about his work-related problems, Massey first discussed Respondent's failure to assign routes on the basis of seniority to insure that the more lucrative routes were assigned to the most experienced drivers. He also mentioned the plant manager's irritation with those who took sick leave. Kachadurian promised to look into these matters and then, concluded by encouraging Massey to remain loyal to the Company, for if he did, the Company would take care of him.

When Stephenson met with Kachadurian, he repeated some of the same complaints Massey had mentioned, including the Company's manner of assigning routes and drivers being burdened with more work than usual when returning from sick leave. Not long after they met with Kachadurian, Massey and Stephenson were assigned more lucrative routes on the basis of seniority. They also found that their supervisors no longer harassed them when they returned from taking sick leave.

In describing his meeting with Kachadurian, Steve Maymon echoed most of the themes raised by his coworkers. Thus, he stated that Kachadurian reviewed Respondent's benefit package, cautioning that if the employees voted for the Union, they had no guarantee they would retain these benefits when lawyers assumed control of the negotiations. He also asked Maymon about the drivers' problems. When Maymon complained about loading trailers and cleaning coolers, Kachadurian told him he had heard these complaints before and intended to hire an additional employee to perform that work.

Kachadurian also raised some new topics. Thus, Maymon related that Kachadurian told him he was uncertain what would happen if the Union won the election; that Respondent might close down. He also told Maymon that the Company knew that Martin was responsible for initiating the union campaign and labeled him a troublemaker. He asked Maymon to give the Company a chance so that he could see that changes were being made.

C. Respondent's Version of the Driver Meetings

Kachadurian described his meetings with the drivers in terms, which varied greatly from those offered by the employees. First, he explained that before the meetings took place, he and his colleagues participated in a training session at which the Company's legal counsel advised them about the "do's and don'ts" of labor relations in a preelection situation. He stated that he subsequently conducted each employee meeting in accordance with the legal advice he was given. For example, in describing his meetings with Chris Martin and Al Tetrault, Kachadurian maintained that he simply reviewed the Company's benefits and handed each of them a prepared package of materials, containing among other things, information about the Company's benefits. He contested virtually every statement the employee-witnesses attributed to him. Thus, he denied telling the drivers that they would lose their benefits, or that bargaining would start from scratch. Instead, he insisted that he simply told the men that "if the (Ludlow facility) becomes unionized, whatever extra benefits they want or whatever benefits they have will all be back into discussions." (Tr. 159.)

Kachadurian apparently had little independent recollection of his meetings with Massey or Stephenson for when questioned about them, he responded with vague generalities. He then attempted to compensate for his lack of specificity by explaining that he delivered the same message to every driver with whom he spoke.

When asked if he questioned Massey about his work-related problems, Kachadurian replied that he had no need to ask, for "Everyone said why they are not happy or what they think they want." (Tr. 161.) In other words, he appears to be saying that the drivers spontaneously presented their complaints without being asked.

Kachadurian specifically denied telling Maymon, or anyone else for that matter, that the Ludlow facility might close if the union won the election. He suggested that Maymon may have misunderstood him when he discussed the possibility that Aqua Cool might have to move from its present site since the Ludlow building had become over utilized.

D. Respondent's Actions Following the Driver Meetings

1. A permanent warehouseman is hired

Soon after the management officials met with the Ludlow drivers, Respondent took steps to remedy the problems, which had emerged in their meeting. The first change came on June 6 when Piotr Dymkowski, an employee with Elite Chemical, was transferred to Aqua Cool as a permanent, full-time warehouseman, while continuing to work a 15-hour week for Elite.[8] His job entailed cleaning the coolers and loading or unloading the trucks, the very work the drivers abjured. Prior to his transfer, his supervisor at Elite, Peter Massmanian, told him that he would not be fired regardless of how he voted. Later, Massmanian added that if the Union won the election Dymkowski, would be unable to participate in Respondent's profit-sharing plan.

Distribution Supervisor Mapel testified that when Aqua Cool first occupied the Ludlow facility, the sales volume did not justify retaining a full-time warehouse worker. Instead, a temporary employee had been hired to work during the busy summer months for the past 3 years. Mapel added that the drivers generally completed their routes ahead of time, and therefore, did not exceed their 8-hour shift when they were asked to work in the warehouse. However, in late 1995, Respondent projected an expanded customer base in the following year, which would require adding a permanent, full-time warehouse employee to the Ludlow staff. Consequently, a requisition to create such a position was approved in December. Although Mapel acknowledged that the employees were complaining about the warehouse work as early as January 1996, the newly authorized warehouse position was not filled until Chris Martin was hired in March. A few days after his arrival, one of the drivers quit and Martin soon replaced him. The warehouse position re-

[8] Although Elite and Aqua Cool belonged to different divisions of Ionics, the record indicates that the supervisors at the two Ludlow enterprises cooperated with one another, particularly with respect to recommending employees when job vacancies occurred.

mained vacant throughout April and May, although Respondent's sales in those months were exceeding projected increases by 50 percent. Distribution Manager Goldman indicated that this unanticipated business expansion made it imperative to fill the warehouse vacancy quickly. Therefore, Respondent turned to the readily available labor pool at Elite and transferred Dymkowski to the warehouse position as of June 6. Although Elite employees had filled in at Aqua Cool on a sporadic basis in the past, this was the first time the transfers were permanent.

2. Two drivers accept reassignments to sales positions

During the second week of June, Mapel met with all of the drivers as a group. After telling them that the Company thought a union was unnecessary, he added that if they elected Local 404 as their collective-bargaining agent, Respondent would have to cooperate. The purpose of the meeting, however, was to announce that two sales positions were available, since one of the current sales people had been promoted to a position in Boston, while the other soon would take maternity leave. Anticipating a busy summer season, management decided to open the sales positions to internal bidding as the most expedient way to fill them quickly. Accordingly, Mapel invited anyone who might be interested in sales work to contact him. Maymon and Atkins, who sold automobiles for 3 or 4 months prior to working for Respondent, both expressed interest in the positions, and before the end of June were assigned to their new posts.

Atkins testified that Respondent did not usually promote from within; rather, sales positions typically were filled through responses to newspaper advertisements.[9] However, he acknowledged that he had been offered a position in sales the previous summer. Although promotions like his and Maymon's were unprecedented at the Ludlow site, and were rare at other facilities, they were not unknown for the record shows that a few employees did shift from Elite's employ to driving positions at other Aqua Cool distribution centers. In the same vein, Aqua Cool drivers have transferred to sales positions at other sites when no union campaign was in progress.

Following Atkins' and Maymon's appointments to sales, two driving positions became available. Respondent filled these vacancies rapidly by transferring two other Elite employees. Consequently, the total driver complement continued to include seven employees. One of the new drivers, Jan Zajko, had experience operating a truck in his native Poland and possessed the requisite chauffeur's license. No evidence was introduced explaining Respondent's reasons for selecting the second Elite employee, Harry Figueroa. At the time of their transfers, the routes originally assigned to their predecessors were rearranged in order to provide better runs to Massey and Stephenson.

III. ISSUES

Based on the allegations in the complaint and the record evidence adduced in this case, the following questions must be resolved:

1. Did Respondent violate Section 8(a)(1) of the Act by:

(a). Soliciting grievances from employees and promising to remedy them.

(b). Telling employees they would lose their benefits if they selected the Union because Respondent would bargain from scratch.

(c). Impliedly telling employees that electing the Union as their bargaining agent would be futile.

(d). Promising an employee benefits if he rejected the Union.

(e). Threatening an employee that the facility would close and implying that jobs would be lost.

(f). Creating the impression that the employees' union activities were under surveillance.

(g). Telling an employee that the driver who contacted the union was a troublemaker.

(h). Granting employees a benefit by hiring a warehouse worker to perform tasks formerly assigned to them.

(i). Granting new benefits to its drivers and improving their terms and conditions of employment by awarding them new routes on the basis of seniority and ceasing to harass them for taking sick leave;

(j). Hiring Elite employees to pack the unit and subvert the representation election.

2. Is a bargaining order necessary here to effectuate the policies of the Act?

IV. DISCUSSION AND CONCLUDING FINDINGS

A. Independent Allegations of 8(a)(1) Violations

1. Respondent solicited grievances and promised remedies

The day after the Union petitioned for an election, a high-level management team traveled to Ludlow from their Watertown offices to meet with the drivers. These meetings, some of which lasted more than 2 hours, were a first in the history of Respondent's labor-management relations at the Ludlow facility. Although the executives generally visited the Ludlow distribution center on a monthly basis, they never before met with the drivers, either individually or as a group, except perhaps, to exchange a casual greeting.

Respondent admitted that the officials held these meetings to find out why the drivers were interested in union representation. They accomplished their purpose with little difficulty. The scenario for each meeting was simple and straightforward. The drivers were called into an office one at a time and met with Kachadurian, Dee, and Goldman, although Kachadurian did all of the talking. Goldman and Dee met separately with some of the drivers on a few occasions.

The drivers indicated that at each of their meetings, Kachadurian inquired about the problems they were confronting. Kachadurian denied questioning the men, insisting that he had no need to solicit grievances since each driver with whom he spoke readily came forward, and without prodding, voluntarily registered his complaints. I have not the slightest doubt that Kachadurian encouraged the employees to present their problems to him. Having never exchanged more than a casual greeting with these high-level officials, it is improbable that the drivers would feel bold enough to register complaints without some prodding. Martin probably expressed the views of his

[9] Respondent denied that Maymon's and Atkins' transfer to sales positions represented a promotion. However, Atkins indicated that he earned more as a salesman than when he was a driver. He regarded "not having to lug water all the time" as an additional benefit.

fellow drivers when he testified that he was uncomfortable meeting alone with the three officials and asked them if the next meeting could be held with all the drivers present.

After listening to each drivers' complaints, Respondent moved quickly to remedy them. For example, after determining that the drivers' most common complaint concerned their assignment to warehouse work, not more than a week went by before Respondent resolved this problem by assigning an Elite employee to Aqua Cool as a warehouse worker.

A few drivers also objected to the way Supervisor Mapel treated them when the returned from sick leave. After the drivers brought their protests of this practice to Respondent's attention, they discovered on returning from their next day of sick leave that this problem had disappeared. Several drivers also this issue within the month, to the drivers' satisfaction.

Respondent's benign response to the drivers' complaints does not annul the unlawful nature of its conduct. See *NLRB v. Exchange Parts,* 375 U.S. 405 (1964)*; Skyline Distributors*, 319 NLRB 270, 275 (1995).[10] Indeed, such conduct may be as destructive of an employee's rights as are negative acts such as threats or terminations. These considerations compel the conclusion that at the height of the union campaign, Respondent solicited its employees' grievances and promised to remedy them, in violation of Section 8(a)(1).[11] *Columbus Mills*, 303 NLRB 223, 227–228 (1991). Accordingly, the corresponding election objection also is sustained.

2. Respondent threatened to bargain from scratch and implied that voting for the Union would be futile

Before reaching the substantive legal questions at issue here, it is necessary to determine what Kachadurian actually said to the employees, a matter which turns on an evaluation of credibility. On the one hand, drivers Martin and Massey testified that Kachadurian told them that if the Union won the election, Respondent would bargain from scratch about the benefits they might receive. Tetrault asserted that Kachadurian delivered the same message to him, but stated that bargaining would begin at zero. Further, Martin, Massey and Tetrault reported that Kachadurian told them it was unlikely the Union could obtain benefits better than those granted to the vast majority of Ionics' other employees, none of whom were organized. Stephenson recalled that Kachadurian pointed out how fortunate the employees were to receive the benefits bestowed by the Company, but if the drivers selected the Union, "we would have to bargain for another health benefit package." (Tr. 111.) Kachadurian purportedly told Maymon that there was no guarantee that the employees' would retain their current benefits in the event of a union victory.

Kachadurian denied making any of the statements the drivers attributed to him. Instead, he maintained that pursuant to counsel's instructions about the do's and don'ts of labor-management etiquette, he simply advised the employees that during the negotiating process, their benefits would be under discussion.

For the reasons set forth below, I conclude that the employees' statements should be credited. I do not reach this conclusion simply by finding that the mutually corroborating reports offered by at least three of the General Counsel's witnesses quantitatively outweigh Kachadurian's conflicting testimony. A far more compelling reason to credit the drivers stems from the fact that three of them—Massey, Maymon, and Tetrault—were in Respondent's employ at the time of the hearing, and testified while management representatives were in the courtroom. Under these circumstances, their testimony has a special guarantee of reliability. By offering evidence which contradicted and accused an agent of the Respondent of wrongdoing, they put their economic security at risk. As the Board has long recognized, this is "a risk not lightly undertaken."[12] *Comcast Cablevision*, 313 NLRB 220, 224 (1993) (and cases cited therein). It also is noteworthy that when Goldman and Dee were called as Respondent's witnesses, they failed to confirm Kachadurian's side of the story, although they were present during most of the meetings he conducted. Lastly, in contrast to the drivers who testified in specific and concrete terms, Kachadurian spoke in broad generalities; he did not seem to have a clear recollection of each meeting or of the employees with whom he spoke. I find, therefore, that Kachadurian told at least three of the employees in a unit with only seven members at the time, that bargaining would be from scratch, or start at zero. While Stephenson attributed a different statement to Kachadurian, the meaning was essentially the same; that is, current benefits would not be on the table and the Union would have to bargain for a new plan.

Kachadurian's comments to Maymon also implied that a union victory could mean that benefits would be lost, and regained only if the Union was successful at the bargaining table. However, his statements on this topic, as Maymon recalled them, were framed somewhat ambiguously. Since there is more than enough evidence from four of the drivers that Kachadurian suggested they would lose their present benefits, and told three of them unequivocally that bargaining would be from scratch or from zero, it is unnecessary to rely on Maymon's testimony in this regard.

In determining whether an employer's comments about bargaining from scratch violate Section 8(a)(1), the Board formulated the following test:[13]

> "[B]argaining from scratch" statements by employer[s] . . . violate Section 8(a)(1) . . . if, in context, they reasonably could be understood by the employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. . . .

[10] Enf. denied on other grounds 99 F.3d 403 (D.C. Cir. 1996).

[11] It could be argued that an employer who fulfills his promises before the union election takes place forfeits the ability to tantalize employees with benefits to be implemented only if the Union is defeated. In the instant case, Respondent apparently was willing to take this risk since the reforms it introduced not only served its legitimate business interests at little cost, but also appeaded the employees while simultaneously signaling the employees that the Union was superfluous.

[12] Although Kachadurian no longer was affiliated with Respondent at the time of trial, Respondent still remains liable for any unfair labor practices that he committed. Thus, his departure from Respondent's employ does not reduce the risk, which these witnesses took.

[13] See *Taylor-Dunn Mfg. Co*., 252 NLRB 799, 800 (1980).

> [S]tatements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

Applying these standards to the factual findings set forth above, I conclude that Kachadurian's rhetoric containing veiled threats that the employees would lose their benefits and that bargaining would be from scratch (or from zero) offends Section 8(a)(1) of the Act. Consider again Kachadurian's remarks to Martin: after stating that the Respondent would bargain from scratch, he commented that "negotiations might result in fewer, the same or greater benefits." He then observed that it was unlikely the drivers would wrest benefits from the employer, which differed from those granted to the rest of the Ionics work force. Essentially the same message was conveyed to Massey, Tetrault and Stephenson.

Respondent argues in its brief that the words quoted above accurately reflect reality and, therefore, fall within the zone of free speech protected by Section 8(c) of the Act. Further, Respondent contends that the quoted statement overrides the alleged comments about bargaining from scratch or from zero.

Respondent's arguments ignore several important considerations. First, sentences do not stand alone nor can they be isolated from the context in which they occur. Even if Kachadurian's remark that bargaining might result in the same, greater, or lesser benefits was valid, he did not indicate, nor would a listener grasp that these words negated any others. At best, his message was ambiguous, and ambiguity must be construed against the promulgator.

In addition, it is important to consider the intimidating setting in which the drivers found themselves when Kachadurian addressed them. None of the employees had ever met privately with one, no less three of Respondent's officials. Each was summoned to a private office where he became a captive audience for an extended period of time. Martin probably reflected the sentiments of his coworkers when he stated that these circumstances made him uncomfortable enough to request that the next meeting be held with all the drivers present. Thus, the finding that Kachadurian threatened the drivers with a loss of benefits and bargaining that would start from scratch in violation of Section 8(a)(1) emerges from the combined effect of his words and the setting in which those words were delivered.

Kachadurian's statement that the drivers were unlikely to win anything more at the negotiating table (and possibly less) than the bulk of Respondent's work force received has an independent, negative impact. No one could mistake the meaning implicit in these words: in effect, he told the drivers that it was pointless to vote for the Union, since nothing would be gained beyond what they would receive without a collective-bargaining agent. By suggesting to the drivers that selecting a union to represent them would be an exercise in futility, Respondent engaged in conduct, which compromised the election and violated Section 8(a)(1). See *Electric Hose & Rubber Co.,* 262 NLRB 186, 215 (1982).

3. Respondent promised benefits if employees rejected the Union

The factual basis for the allegation that Respondent promised benefits to employees if they rejected the Union rests on Massey's credited testimony that Kachadurian assured him he would be rewarded if he remained loyal to the Company, pointing, by way of example, to Supervisor Mapel.

It is evident that Kachadurian equated loyalty to the Company with the defeat of the Union. In identifying Mapel as an example of the sort of reward he had in mind, Kachadurian implied that Massey, too, could become a supervisor if he disavowed the Union. By conditioning the grant of a benefit on an employee's withdrawing support for the Union, Kachadurian again unlawfully interfered with an employee's Section 7 rights and engaged in conduct, which tended to interfere with a fair election.

4. Respondent threatened to close the Ludlow facility

Paragraph 7(b)(ii) of the complaint and election Objection 5 allege that Respondent impliedly threatened the employees with closure of the Ludlow facility and loss of jobs if they elected Local 404 as their collective-bargaining agent. This allegation hinges on Maymon's testimony that Kachadurian said, "He's not sure if . . . it [the Ludlow facility] would stay open or if it would close." (Tr. 124.)

Kachadurian denied making such a statement. To buttress his denial, Respondent points out that another driver, Stephenson, testified that Kachadurian assured him the plant would remain open even if the Union won the election. More importantly, Respondent submits that it would be illogical for Kachadurian to make such a statement or for the employees to believe him if he did, since business considerations dictated the continued presence of a distribution center in proximity to the Aqua Cool bottling plant in the nearby town of Waterbury. Respondent further argues that even if Kachadurian made the remarks Maymon attributed to him, they were equivocal expressions that did not rise to the level of a statutory violation. Respondent's arguments are not persuasive**.**

Maymon, the driving force behind the union movement, was elevated to a sales position, which he still held at the time of the instant trial. Thus, he had more to lose by testifying against the Respondent than any other employee. Yet, he did not falter in attributing the threatening remark to Kachadurian. His also testified in a manner that demonstrated he was taking care not to exaggerate or misstate his experiences and observations about Respondent's conduct during the union campaign. For these reasons, I found him to be an especially convincing witness whose testimony regarding Kachadurian's threat of plant closure was entirely credible.

Respondent also argues that even if Maymon is to be believed, he indicated that Kachadurian's remarks were equivocal, stating only that he did not know if it would close, or stay open. The fact that Kachadurian did not forecast plant closure as a certainty does not negate the threatening implications of his remarks. Even an allusion to plant closure when made by the principal officer of a company, has a particularly ominous ring.

Respondent contends that for business reasons, closure of the Ludlow facility was so improbable that Kachadurian would not have attempted to threaten Maymon with such an obviously unbelievable remark. Respondent insists that if he did allude to closure, then it was in connection with Aqua Cool moving to a nearby site with more adequate space.

My observations of Maymon convince me that he was prescient enough to distinguish between a reference to plant relocation for valid business purposes and plant closure for retaliatory purposes. Maymon clearly was testifying about the latter prospect. While Respondent's officials may have known that a shutdown of the facility was far-fetched, a rank-and-file employee might well be fearful about the Company's future when a senior member of management refers to the possibility of closure.

Maymon did not suggest that Kachadurian expressly mentioned job losses, yet that is a common occurrence when a plant shuts its doors partially or entirely. Indeed, the possibility of unemployment is the very reason why an employer might hint at closure. Consequently, I conclude that it is reasonable to infer that Kachadurian's threat of plant closure subsumed an attendant loss of jobs.

Noting that no proof was adduced that Maymon relayed Kachadurian's threat of plant closure to other employees, Respondent suggests that it could not have affected the outcome of the election.[14] However, given the small size of the unit, and proof that the drivers banded together in their union activities, it is inconceivable that they did not share information with one another about their respective meetings with the three Aqua Cool officials. In the final analysis, the fact that no direct evidence was adduced to prove that Maymon relayed Kachadurian's threat of plant closure to his fellow drivers is irrelevant to a finding that Respondent violated Section 8(a)(1) and engaged in objectionable conduct by threatening even one employee that the Ludlow facility might close if the union became the employees' bargaining agent.

5. Respondent created the impression of surveillance

While meeting with Maymon, Kachadurian remarked that Respondent knew that Chris Martin, whom he called a "troublemaker," initiated the union campaign. Kachadurian did not reveal how he obtained this information, nor explain why he gratuitously referred to Martin in this way. Maymon knew, of course, that Kachadurian was mistaken about Martin's role, but that is beside the point. Right or wrong, Kachadurian's comment conveyed the notion that he, or his agent, investigated the drivers' union activities in order to identify the one person whom he believed was most responsible. Where, as here, a respondent creates the impression of engaging in surveillance of its employees' involvement in protected, concerted activities, a finding is in order that Section 8(a)(1) was violated. See *Tartan Marine Co.,* 247 NLRB 646 (1980). It follows that the corresponding objection to the election also is sustained.

[14] As a management official attempting to subvert the employees' support for the Union, it is not surprising that Kachadurian would say one thing to Stephenson and another to Maymon.

6. Respondent lawfully transferred two drivers to sales and two elite employees to the vacant drivers' posts

As detailed above, when two sales persons left the Ludlow site, Respondent promoted Atkins and Maymon to those vacancies. At the same time, three Elite employees transferred to Aqua Cool; two filled the vacant drivers positions and the third became a warehouse worker. The General Counsel contends that Respondent took these steps to dilute the Union's majority and thereby undermine the election. Respondent counters that the vacancies in the sales department had no relationship to the union campaign, and that the other employment decisions were responsive to urgent business considerations.

The General Counsel does not challenge the fact that two sales positions became available. Rather, he argues that the appointment of drivers to the sales jobs, which were not included in the bargaining unit, and the transfer of Elite employees to fill the vacant drivers' positions and the warehouse post, were prompted by unlawful considerations; namely, to remove two union adherents from the unit and then reassign other employees to the unit in order to subvert the election. To support this argument, counsel contends that the promotion of drivers to sales work was unprecedented; that Respondent's prior practice was to fill such positions with applicants who responded to newspaper advertisements. The General Counsel argues that by recruiting two employees from the bargaining unit who were union supporters, Respondent created vacancies, which could be filled by employees who were not union sympathizers, and thereby subvert the election.

To refute the government's argument, Respondent established that sales positions generally were filled in a variety of ways. Thus, one of the four sales representatives at the Ludlow facility transferred from Elite Chemicals to Aqua Cool in 1992. Another salesman was referred to Respondent by two other employees. Although Ludlow drivers had not been invited to apply for sales positions in the past, unchallenged evidence was presented which proved that several drivers at other Aqua Cool locations had transferred to sales positions.

Further, Respondent contends that an unanticipated expansion of its business created a need to fill the vacancies quickly if it wanted to maintain this growth pattern during the busy summer months. Therefore, Respondent submits that it made sense to hire from within and thereby avoid the 2- to 6-week delay that occurs when applicants are sought through advertisements. Further, Respondent points out that it announced the openings to all Ludlow employees, not just the drivers; and that Atkins and Maymon were not recruited for the positions; rather, they volunteered for them. Moreover, Atkins had prior sales experience and was asked once before if he would transfer to sales.

Respondent's invitation to Ludlow drivers to apply for sales positions just after the Union petitioned for an election, and its failure to seek a replacement for the pregnant sales woman long before the date her maternity leave was to begin, does tend to cast doubt on its claim that business interests alone led it to fill the sales vacancies swiftly. However, doubts alone cannot substitute for substantial evidence, which proves that the drivers were appointed to the sales positions to prevent them from participating in the representation election. Since they were not

importuned to accept these positions, the argument that Respondent purposely caused them to defect from the unit cannot be entertained.

The record also fails to support the General Counsel's contention that Respondent hired Elite employees to fill the drivers and warehouse vacancies in order to pack the unit dilute the Union's strength, and subvert the election. One of the drivers, Jan Zajko, while working for Elite, asked about the possibility of a driver's position with Aqua Cool a few months before he was transferred there. Moreover, the Company knew that he had experience as a truckdriver in his native Poland, and possessed a current chauffeur's license. No evidence was introduced as to the qualifications of the second Elite employee, Harry Figueroa, who was hired as an Aqua Pool driver. Consequently, no foundation exists to show that he was transferred for illegitimate reasons.

The General Counsel correctly cites *Einhorn Enterprises*, 279 NLRB 576, 592–596 (1986), *Suburban Ford*, 248 NLRB 364 (1980); and *Maxi Mart*, 246 NLRB 1151 (1979), for the proposition that an employer who hires substantial numbers of employees in order to pack the unit so as to dilute a union's strength in a representation election, violates Section 8(a)(1) of the Act. A synthesis of the cited cases indicates that the Board asks the following questions in determining whether an employer has hired new employees to pack a unit and subvert an election: (1) were the newly hired employees unqualified for the positions they filled (2) were they hired on a temporary or part-time basis and not expected to remain after the election, or (3) were they employed only after management determined that they were unsympathetic to the union. Id. No evidence was adduced in the instant case, which answers these questions affirmatively, or demonstrates that any of those elements were operative here.

The only factors on which the General Counsel relies to prove its packing theory is the coincidental timing of the transfers, coming rapidly on the heels of management's meetings with the drivers, coupled with the unlawful solicitation of their grievances and the promises to rectify them. Respondent answers the General Counsel's contentions in this way: the timing is fortuitous, for legitimate business considerations justified the decisions to hire Elite employees for the warehouse and driver positions .

Respondent defends hiring Dymkowski for the warehouse job by pointing out that authorization to fill that position was granted in December 1995, based on projections of increased sales in the coming year. Initially Martin was hired to fill that job. Respondent claims that management was unaware that Martin became a driver, leaving the warehouse position vacant for over 2 months.

This defense is wholly unpersuasive. Even assuming for the moment that Respondent's managers in Watertown were unaware that the warehouse position was unfilled, Ludlow plant Manager Begley and Distribution Supervisor Mapel cannot make the same claim. They compensated for Martin's appointment to a driving position by assigning warehouse chores to the drivers. In this way, the warehouse work was performed while Respondent avoided the expense of paying another full-time employee, even though they were authorized to do so. The Aqua Cool executives, although not regularly on the scene, also had to know of this situation, first because their onsite supervisors were responsible for informing them of such developments. In addition, by their own admission, they visited the Ludlow facility approximately once a month and knew that sales were well ahead of projected increases. Therefore, Respondent's officials either were unobservant, failed to ask local supervisors the right questions, or found it convenient to have the drivers assume warehouse duties, at least until the Union's advent made it advantageous to hire a full-time warehouse employee.[15]

By finding a full-time warehouseman just days after the Union petitioned for an election, Respondent cured the chief irritant which had impelled its drivers to seek union representation and thereby undermined the employees' support for Local 404. In this way, Respondent granted the unit employees a benefit and altered their conditions of employment, conduct which violates Section 8(a)(1).

What the Government failed to prove is that the three Elite employees were transferred to pack the Aqua Cool bargaining unit and subvert the election. The record contains nothing, which suggests that the Elite employees accepted positions with Aqua Cool temporarily, intending to return to their former jobs as soon as the election was over. Moreover, they apparently were qualified for their new positions. In fact, one of the new employees had prior experience as a driver, making him a particularly suitable choice. Dymkowski continued to work in the warehouse at the time of trial, suggesting that he was a satisfactory employee as well. Since no factual support exists for the allegation that the Elite employees were hired to dilute the union's strength in the election, I shall recommend dismissal of paragraphs 7(f) and (i) in the complaint and overrule the analogous objections to the election in Case 1–RC–20467.

B. The Election Objections

As previously noted, the Union filed objections to the July 11 election, which are identical with the allegations of the complaint and were consolidated for hearing with it. By way of summary, I rejected the contentions set forth in Objections 13 and 14 and recommend that they be overruled. In all other respects, the objections have been sustained. Therefore, I recommend that the election conducted on July 11, 1996, be set aside.

C. A Bargaining Order is Warranted in the Circumstances of this Case

1. Respondent's misconduct tended to undermine majority strength

The final issue to be resolved is whether Respondent's numerous violations of Section 8(a)(1) warrant issuance of a bargaining order under the authority of *NLRB v. Gissel Packing*

[15] Respondent contends that the drivers would not know they were receiving a benefit when Dumkowski was hired as a warehouse worker in early June, since a temporary mployee had been hired in previous summers to fill this this job. Respondent's argument overlooks the fact that some of the drivers were assured that a permanent warehouse employee would be hired. Moreover, nothing prevented the drivers from asking Dumkowski about his status.

Co., 395 U.S. 575, 613–615 (1969). In that landmark case, the Supreme Court ruled that even absent "outrageous and pervasive unfair labor practices," a bargaining order is appropriate in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." However, in order to justify this extraordinary remedy, the Board also must conclude "that the possibility of erasing the effects of the unlawful conduct and ensuring a fair election by the use of traditional remedies is slight and would be better protected by a bargaining order." Id. at 614. In short, whether a bargaining order should issue turns on the nature and extent of the employer's misconduct and its likely impact on the employees' ability to exercise free choice in the election.

To recapitulate, after obtaining validly signed authorization cards from six of seven persons then in the admittedly appropriate unit, Union Business Agent Krazcyk met with Ludlow Plant Manager Begley on May 24 and requested recognition for Local 404. The request soon was denied. Within days of the request, three of Respondent's high ranking officials ran a series of meetings with the card signers, one at a time, to determine what issues were fueling their interest in union representation. During these meetings, one official in particular, Kachadurian, committed various unfair labor practices which included threats that the employees' benefits would be compromised since Respondent would bargain from scratch, that the drivers would gain nothing at the bargaining table which unrepresented employees did not have, and that selecting the union was a futile gesture. He also implied that the facility might shut down which could mean a loss of jobs, conveyed the impression that the employees' union activities were under surveillance, and disclosed his bias against union adherents by calling the man he believed had instigated the union campaign a "troublemaker."

While issuing threats on the one hand, Kachadurian promised and delivered benefits on the other. The drivers were encouraged to identify their work-related problems, and when they did, Respondent made sure they were remedied. Thus, when most of the drivers objected to performing uncompensated warehouse work, the matter was resolved swiftly with the employment of a conveniently located Elite employee; the drivers' displeasure with their treatment after taking a day of sick leave vanished almost overnight. Complaints about the inequitable assignment of delivery routes also were resolved expeditiously. In one instance, Kachadurian hinted to an employee that rewards would be his as long as he rejected the Union. He told several other employees that he wanted to continue to help them, but would be prevented from doing so for the lawyers would take over if the Union won the election. Having demonstrated to the drivers how effective he could be in resolving their problems, this suggestion that he would be unable to intervene on their behalves was untrue not to mention threatening.

Respondent's misconduct was not of the most egregious variety. The facility was not closed in whole or part, the work force was not laid off, and no one was discharged, disciplined, or transferred involuntarily. Nevertheless, Respondent's calculated efforts to intimidate the drivers were extensive and pervasive. No one in the unit escaped being threatened, and it is more than likely that when one driver was threatened, the others quickly learned about it. As I stated previously, I find it improbable that the men did not share with one another their encounters with management. Thus, the drivers were led to believe that their benefits would be lost, that their union activities were under surveillance, that Respondent would be intransigent at the bargaining table, that Respondent considered the man who was thought to be responsible for the union campaign a troublemaker, and told the individual who actually was responsible that the facility might close.

Respondent's efforts to resolve the employees' complaints played an important role in wooing them away from the Union. As I stated in *Skyline Distributors*, 319 NLRB at 279: "Precisely because of their benign character . . . such actions may be more invidious than threats of plant closure, discharges or other displays of strength." *Tower Records*, 182 NLRB 382, 387 (1970), also is instructive. There, the Board aptly observed that an employer's award of a wage increase to employees following the union's demand for recognition: results in giving the employees a significant element of what they were seeking through union representation. It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed.[16]

When Local 404's business agent requested recognition on May 24, six of the seven drivers in an appropriate unit had signed authorization cards. In the representation election held on July 11, only 6 weeks later, the Union was defeated by a vote of eight to one. The employees' defection can be explained in only one way—Respondent's deliberate countercampaign, with its reliance on threats and promises, succeeded in undermining majority strength and impeding the election process.

2. Traditional Board remedies cannot erase effects of Respondent's misconduct

A final question remains in determining whether a *Gissel* bargaining order should issue: can the effects of Respondent's unlawful conduct be erased by resort to traditional remedies so that a fair election can be held? This question must be answered in the negative.

Traditional Board remedies in a case such as this would entail the issuance of an Order and posting of a notice to employees requiring that Respondent promise not to engage in the same or related unfair labor practices discussed above, and not to interfere with, restrain, or coerce employees in exercising their Section 7 rights. It might also require setting aside the election and requiring a rerun election. In light of the considerations set forth below, I am not sanguine that the Board's traditional remedies would be effective.

It is true that the person principally accountable for flouting the Act is no longer affiliated with the Respondent. While Dee and Goldman still were on the scene at the time of the trial, only Goldman was directly responsible for an unfair labor practice act—soliciting and promising to remedy an employee's

[16] Enfd. 79 LRRM 2736 (9th Cir. 1972). Quoted in *Skyline Distributors,* supra.

complaints. However, they were present at a series of meetings held with the drivers immediately after Respondent learned that the Union had filed for an election and heard their colleague, Kachadurian, issue threats, veiled and otherwise, and make unlawful promises to the men. Yet, they remained silent and did not attempt to prevent him from violating the code of conduct, which they knew was supposed to govern their behavior during the preelection period. Moreover, they surely participated in or knew that the drivers' complaints were being remedied. They also were present and remained silent at the instant trial while Kachadurian falsely denied having made unlawful statements to the drivers.[17] Therefore, it is far from certain that the officials who continue to govern Aqua Cool can be counted on to ensure an environment in which the unit employees can exercise a genuinely free choice.

The unit, which the parties agreed was appropriate, is a very small one, and the turnover has been modest. Three of the six drivers who originally signed authorization cards as well as the May 22 petition signifying their intent to have the union represent them continued to drive for Respondent at the time of the instant hearing.[18] Less than 6 months have elapsed since the election took place. Given this relatively short time span, it is unlikely that the unit employees who voted in the first election will have forgotten the Company's reaction to the Union's advent. In these circumstances, it is doubtful that the Board's traditional remedies can erase the effects of Respondent's unfair labor practices and ensure a fair election. Therefore, employee sentiment once expressed through authorization cards can be better served by means of a *Gissel* bargaining order.

CONCLUSIONS OF LAW

1. The Respondent, Aqua Cool, a Division of Ionics, Inc., Ludlow, Massachusetts, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union 404, a/w International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2 (5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(B) of the Act:

> All full-time and regular part-time warehouse workers, driver/servicemen and water supply drivers, employed by the Employer at its 203 West Street, Ludlow, Massachusetts facility in its Aqua Cool bottled water distribution business, but excluding all other employees, office clerical employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

4. At all times since May 24, 1996, the Union has been and is now the exclusive representative of the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent violated Section 8(a)(1) of the Act by:

(a) Threatening employees that they were likely to lose their benefits and that Respondent would bargain from scratch, or bargain from zero, if they selected the Union as their collective-bargaining representative.

(b) Telling employees by implication that it would be futile to select the Union as their collective-bargaining agent.

(c) Promising an employee that he will benefit if he withdrew his support of the Union.

(d) Implicitly threatening employees that the facility would close and jobs would be lost if the employees voted for union representation.

(e) Soliciting grievances from its employees, promising to remedy them, and implementing those promises.

(f) Creating the impression that its employees' union activities were under surveillance.

(g) Informing an employee that the driver who was thought to have initiated the union campaign was a troublemaker.

(h) Granting benefits to its employees and improving their terms and conditions of employment by hiring a warehouse worker to engage in work which the drivers previously performed, granting drivers new delivery routes according to seniority, and ceasing to harass them for taking sick leave.

5. Respondent did not attempt to subvert the representation election conducted on July 11, 1996, by transferring two of its employees, Scott Atkins and Steven Maymon, to sales positions, nor by hiring and transferring two Elite employees to driving positions and a third Elite employee to a permanent position in its warehouse.

6. Since May 24,1996, Respondent has failed and refused to recognize and bargain with the Union as the exclusive bargaining representative of its employees in the unit described above in paragraph 3, thereby violating Section 8(a)(1) and (5) of the Act.

7. In light of the Respondent's unfair labor practices outlined in paragraphs 4(a)–(i) and 6, above, that a bargaining order is required in the circumstances of this case.

8. The unfair labor practices described in paragraphs 4 and 6 above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has committed certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, on request, the Respondent shall be ordered to recognize and bargain in good faith with the Union as the exclusive representative of the employees in the unit described above and, if agreement is reached, to execute an agreement.

I also shall recommend that the Respondent post a notice to employees in which it promises not to engage in like or related conduct which interferes with, restrains, or coerces its employees in the exercise of rights guaranteed by Section 7 of the Act.

[Recommended Order omitted from publication.]

[17] As executives, Dee and Goldman, at a minimum, had the power to recommend that Respondent not contest the impropriety of Kachadurian's actions.

[18] The three are Massey, Stephenson, and Tetrault. No evidence was presented that any one sought to withdraw his authorization card.